

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1604-CR

Cir. Ct. No. 2014CF455

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS STEVEN KORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
R. MICHAEL WATERMAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Curtis Korn appeals his conviction for possession of methamphetamine. Korn argues the circuit court erroneously denied his motion to suppress the drugs found in his car after a traffic stop. We affirm.

BACKGROUND

¶2 A Wisconsin State Patrol trooper was on duty on a stretch of Interstate 94 in St. Croix County and stopped Korn's vehicle in the early morning hours in the Town of Cady. The stop was initiated because of loud exhaust. The trooper approached Korn's vehicle on the passenger's side and obtained Korn's driver's license. While talking to Korn, the trooper looked down and noticed "stuffed between the passenger and the passenger door" a two-and-one-half foot pipe with tape wrapped around the end like a handle. According to the officer, the pipe "looked like it was a manmade weapon."

¶3 Another trooper arrived on scene and approached the driver's side of the vehicle. The trooper noticed another pipe eighteen inches in length between Korn and the driver's door that "looked like a weapon." The passenger was asked for his identification, which revealed he was a convicted felon on supervision with a warrant "from Albany PD that was geographically restricted and was not servable in St. Croix County."

¶4 Korn would not give the troopers a direct answer concerning the pipes observed in the vehicle, but he advised the officers that he had a concealed carry permit and a machete-type weapon made from a large paper cutter within the vehicle. Korn also admitted he was carrying a knife. The troopers asked Korn and the passenger to step out of the vehicle. When the passenger exited, one of the troopers observed on the passenger floorboard a Q-tip with black residue. The trooper associated the Q-tip with methamphetamine use, based on involvement in

“thousands of drug cases.” The trooper later tested the Q-tip using a field kit, and it tested positive for methamphetamine.

¶5 A frisk of Korn revealed the knife. A subsequent limited search of the vehicle disclosed a small locked plastic safe under the driver’s seat, which contained four baggies of methamphetamine, a pipe containing a white crystalline substance, and a “dauber” used to clean pipes. Under the passenger seat, the officers found the paper cutter machete that “looked like it had recently been sharpened.”

¶6 Korn was charged with possession of methamphetamine and drug paraphernalia. The circuit court denied a suppression motion, noting the troopers stopped Korn at 2:00 a.m. and observed pipes in the car fashioned into weapons. The court further noted Korn had a concealed knife on his person and also admitted he had a “jerry-rigged paper cutter” in the vehicle. The passenger was a convicted felon. Based on this evidence, the court concluded the troopers had a reasonable suspicion that Korn and his passenger posed a threat to the troopers justifying the protective search. After a motion to reconsider was denied, Korn pleaded guilty to possession of methamphetamine. The court imposed a withheld sentence with a three-year term of probation. Korn now appeals, challenging the denial of his suppression motion. *See* WIS. STAT. § 971.31(10) (2015-16).

DISCUSSION

¶7 Korn’s argument on appeal is narrow. He does not challenge the initial stop of his vehicle, nor does he argue the troopers needed additional justification to open the safe containing drugs if they lawfully discovered it under the driver’s seat. Korn also does not identify any evidence discovered on his person that he believes should have been suppressed. The only issue on appeal is

whether the troopers violated Korn's Fourth Amendment rights when they conducted a protective search of his vehicle.¹

¶8 The reasonableness of a protective search is determined based upon an objective standard. *See State v. McGill*, 2000 WI 38, ¶23, 234 Wis. 2d 560, 609 N.W.2d 795. The standard is whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger. *Id.* Courts apply this standard on a case-by-case basis, evaluating the totality of the circumstances to determine whether an officer had reasonable suspicion to justify a protective search in a particular case. *See State v. Buchanan*, 2011 WI 49, ¶9, 334 Wis. 2d 379, 799 N.W.2d 775. It is a common-sense test, and the required showing of reasonable suspicion is low and less demanding than probable cause. *Id.*

¶9 Korn argues the troopers had no reason to conduct a protective search of the vehicle for weapons. He asserts:

[The troopers] knew for a fact that Korn was armed because the troopers had already seen the two wrapped pipes and Korn had told them about the knife on his side (which was confirmed by the trooper's frisk of Korn) and that there was a machete made from a paper cutter blade in the back seat, which was found during the subsequent search of the vehicle. Mr. Korn also told the troopers that he possessed a concealed carry license, which permitted him to possess concealed weapons. Why then could these troopers have needed to search for even more weapons when Korn had been stopped because of a loud exhaust?

¹ Korn's suppression motion included "a Q-tip, a plastic safe and its contents, including 4 baggies of a white crystal substance, a clear glass pipe with its contents and a white dobber [sic] with black residue."

¶10 Korn's argument is fallacious and would require officers conducting traffic stops who know that a driver has weapons in the vehicle to assume those are the only weapons in the vehicle. In fact, the potential presence of other weapons in the vehicle may pose an even greater danger to officers. For instance, Korn told the troopers that he had a license to carry a concealed weapon, allowing him to carry a concealed handgun. *See* WIS. STAT. §§ 175.60(1)(j); 941.23(2)(d) (2015-16). A handgun would pose a greater danger to the troopers than pipes or a homemade machete. Under the circumstances, it was reasonable for the troopers to believe there could be a handgun, or other weapon in the car, in addition to the unusual assortment of improvised weapons they knew about.

¶11 Korn also improperly discounts the fact that his passenger was a felon. Korn contends there is no indication in the record of the nature of the felony conviction and asserts the felony was an "unknown, potentially non-violent crime" that did not provide an objective reason to believe the passenger was a danger to the troopers. But this argument would require officers interacting with a person they know to be a felon to disregard that fact unless they know the felony conviction was for a violent offense. This requirement would pose an unreasonable risk to officers. And, although the fact of the felony conviction itself did not establish reasonable suspicion, it added to the totality of the evidence that supported the troopers' reasonable concern for their safety. *See Buchanan*, 334 Wis. 2d 379, ¶13.

¶12 Korn also insists "the few specific facts relied upon by the troopers to frisk Mr. Korn (and then his vehicle) were simply not sufficient to show an objectively reasonable suspicion to believe that Korn or his passenger were dangerous." However, a court need not "restrict its reasonableness analysis to the factors the officer testifies to having subjectively weighed in [the] ultimate

decision to conduct the frisk” but may “look to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by [the officer’s] testimony at the suppression hearing.” *McGill*, 234 Wis. 2d 560, ¶24.

¶13 Here, a number of very specific facts in the record support a reasonable suspicion that the troopers’ safety could have been in danger. The traffic stop occurred at 2:00 a.m. in a rural area in St. Croix County.² Wisconsin courts recognize an officer’s visibility at night is reduced by darkness, and the isolation of the scene and the number of people in the area may contribute to the determination of reasonable suspicion. *See id.*, ¶¶25, 32. Moreover, both Korn and the passenger had makeshift weapons next to them when the troopers approached the vehicle. Korn did not give a clear answer concerning the nature of the pipes apparently fashioned into manmade weapons. He also told the troopers he had a machete-type weapon made out of a paper cutter blade in the vehicle and that he had a concealed carry license. These facts alone would raise a reasonable suspicion of danger to the officers, but the troopers further knew the passenger was a convicted felon on supervision who “had a warrant.” In addition, when the passenger was asked to step out of the vehicle, the trooper saw a black Q-tip associated with methamphetamine use. Rational suspicion of drug activity, and the special risks to officer safety posed by drug investigations, is another factor that may be considered. *See State v. Williams*, 2001 WI 21, ¶54, 241 Wis. 2d 631, 623 N.W.2d 106. Under the totality of the circumstances confronting the officers,

² The estimated population of the Town of Cady was 829 people. *See Wisconsin Blue Book* 757 (2015-16). We take judicial notice of the Blue Book. *See Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 353 n.3, 344 N.W.2d 177 (1984).

the protective search of Korn's vehicle was based on a reasonable suspicion that their safety was in danger.

¶14 Korn insists that even if we conclude the troopers had reasonable suspicion to support a protective search, the search of his vehicle was not reasonable under *Arizona v. Gant*, 556 U.S. 332 (2009). In that case, the Court held: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351.

¶15 Korn acknowledges that *Gant* involved the search of a vehicle incident to arrest, but he argues *Gant*'s rationale applies to protective searches as well. However, we rejected that argument in *State v. Bailey*, 2009 WI App 140, 321 Wis. 2d 350, 773 N.W.2d 488.

¶16 In *Bailey*, the defendant was pulled over for an unlawfully tinted window violation. *Id.*, ¶2. We held that the ensuing protective search of the vehicle, during which the officers discovered drugs, was justified by a reasonable suspicion of danger to the officers. *Id.*, ¶¶34-43. We distinguished *Gant* because it was a case involving a search incident to arrest. *Bailey*, 321 Wis. 2d 350, ¶44. We noted that "Gant arrived home, parked and exited his car and was about ten to twelve feet away from his car when he was immediately arrested and handcuffed for driving with a suspended license." *Id.* Gant was therefore not going to be returning to his vehicle, but Bailey would be returning to his vehicle after the tinting citation had been issued. Accordingly, we held that it was reasonable for the officer to make sure that Bailey would not be returning to a vehicle containing a gun that Bailey could then turn on the officers. *Id.*, ¶48.

¶17 Korn concedes that neither he nor his passenger had been arrested at the time of the protective search. Both would have been returning to the vehicle after the completion of the traffic stop. The Fourth Amendment does not require police to ignore their reasonable concerns for their safety, including that individuals may be concealing weapons in their vehicles. *See id.* It was reasonable for the troopers to make sure Korn and his passenger would not be returning to a vehicle that housed a gun or other unknown weapon that could be turned on the troopers. Accordingly, ***Bailey*** compels rejection of Korn’s argument that ***Gant*** applies to this case.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

